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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1004

ARDEN FARMS CO., a Delaware corporation, and DAMASCUS MILK COMPANY, d/b/a CARNATION COMPANY, an Oregon corporation,

Appellants,

vs.

STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER,

Appellees.

On Appeal from the Supreme Court of the State of Oregon

JURISDICTIONAL STATEMENT

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STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER,

Appellees.

On Appeal from the Supreme Court of the State of Oregon

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Oregon entered on November 23, 1966 reversing the judgment of the Marion County Circuit Court, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Oregon is re-

ported at 83 Or Adv Sh 543, 420 P2d 379. It is printed, with the judgment of the court, in Appendix A, infra 17. The opinion of the Marion County Circuit Court is unreported. It is printed in Appendix B, infra 31.

JURISDICTION

This is a suit brought by appellants in Marion County Circuit Court[1] seeking a declaration that a milk control regulation of appellee State Department of Agriculture is invalid and an injunction against its enforcement. Appellants, who are Oregon milk processors, alleged that the regulation is an unconstitutional burden on and regulation of interstate commerce in violation of Article I, Section 8 of the United States Constitution (R 7).

The circuit court entered a declaratory judgment and decree granting the requested relief (R 84). Appellees appealed to the Supreme Court of Oregon, and on November 23, 1966 that court filed its opinion and entered its final judgment reversing the judgment and decree of the circuit court. It held that the regulation does not unconstitutionally burden or regulate commerce (R 88), infra 18-26.

The Supreme Court of Oregon denied appellants' petition for rehearing on December 20, 1966 (R 91),

1. Under ORS 183.400 and Chapter 28, Oregon Revised Statutes.

and they filed their notice of appeal in that court on December 23, 1966 (R 93).

The jurisdiction of this Court to review the decision of the Supreme Court of Oregon by direct appeal is conferred by 28 USC § 1257(2). The following decisions of this Court sustain its jurisdiction to review the judgment on direct appeal in this case: *Atchison R. Co. v. Pub. Util. Comm'n.*, (1953) 346 US 346 at 347-349; *Lathrop v. Donohue*, (1961) 367 US 820 at 824-825; *Dean Milk Co. v. Madison*, (1951) 340 US 349 at 351; *Sultan Ry. Co. v. Dep't. of Labor*, (1928) 277 US 135 at 136.

QUESTION PRESENTED

Whether a state administrative regulation which requires appellants to include a substantial part of their fluid (Class 1) use of out-of-state milk in their reported usage of Oregon milk and pay Oregon producers for the same at minimum prices fixed by the state, which regulation was adopted to protect the Oregon producer blend price against such use of imported milk and substantially increases the cost of importing and using milk produced in other states, is an unconstitutional burden on and regulation of interstate commierce in violation of Article I, Section 8 of the United States Constitution.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The provision of the United States Constitution which is involved is Article I, Section 8:

> "The Congress shall have power * * *
>
> "To regulate Commerce with foreign Nations, and among the several States, * * *"

The state administrative regulation which is involved is Administrative Order AD 17-64, adopted October 1, 1964, effective November 1, 1964. The regulation is set forth in Appendix C, infra 40.

STATEMENT

Appellants commenced this proceeding for declaratory and injunctive relief on November 17, 1964 in Marion County Circuit Court, attacking the validity of an administrative regulation adopted by appellee State Department of Agriculture on October 1, 1964 (R 1, 11; Ex 10).[2]

Since October 1, 1963 Oregon milk producers[3] have been organized in a state-administered market pool in which they receive fixed minimum prices for their milk according to its use as fluid (Class 1) and manufactur-

2. The other defendants are the principal administrative officers of the Department, who are charged with its enforcement (R 2, 37, 48).
3. And out-of-state producers who agree to join the pool, infra 41.

ing (Class 2) milk.[4] Each producer is assigned a proportion (called a "quota") of the total Class 1 use of pool milk, and all payments for Class 1 use are divided among pool producers according to their quotas.[5] All other pool milk is paid for at the fixed minimum Class 2 price, which is less than the Class 1 price by more than $2.00 per cwt (R 38-39, 48, 66).

Appellants are Oregon processors who import substantial quantities of Grade A milk into Oregon from Washington, Idaho and California for processing and sale, in Oregon and elsewhere, as fluid (Class 1) milk (R 39, 48, 62, 63).[6] This milk is purchased at competitive market prices which lie between pool prices for Class 1 and Class 2 milk (R 57, 66, 70). Prior to adoption of the questioned regulation, fluid use of imported milk was excluded from the pool if the milk was segregated for such use (R 35, 39, 48). During 1964, the volume of imported milk increased, and appellees concluded that the market pool blend price was being depressed by its use as fluid milk outside the pool (R 61; Ex 9, 11). To resolve this asserted problem in the interests of Oregon producers (Ex 9), the present regulation was adopted. It requires the importing processor to report as Class 1

4. ORS 583.002, 583.004 and 583.405 to 583.545.

5. The pool also adjusts payments among processors, so that each processor ultimately pays the Class 1 price for his Class 1 use of pool milk and the Class 2 price for his remaining use of pool milk. See OAR 06-015, Ex 15.

6. It is admitted that appellants actually use the milk as fluid milk and pay the full market price for it in the state of origin (R 39, 48).

use supplied by pool producers such proportion of their total deliveries as equals his plant ratio of Class 1 use of pool *and* nonpool (imported) milk, whether or not pool producers have supplied that amount of his Class 1 sales (Ex 10). This requires the processor to pay pool producers the fixed minimum Class 1 pool price for any fluid use of out-of-state milk which exceeds his plant ratio.

Since appellants import only part of their total milk needs[7] and their ratio of fluid use of imported milk is higher than their plant ratio (R 39-40, 48, 69), the effect of the regulation is to guarantee Oregon producers payment for a substantial amount of Class 1 use which they have not supplied. Those payments for "excess" Class 1 use of imported milk are, of course, in addition to the full market price already paid for the milk in the state of origin and are a genuine part of the cost of importing and using it.[8]

Appellants alleged in their complaint that the regulation is an unconstitutional burden on and regulation of interstate commerce in violation of Article I, Section

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7. Appellants supply a large part of their Class 1 and Class 2 needs with milk purchased from Oregon producers (R 62-63, 69).

8. Since the effect of the regulation, from the standpoint of the pool, is to increase the Class 1 use and decrease the Class 2 use of pool milk in equal amounts, the resulting penalty to the handler consists of the difference between the Class 1 and Class 2 pool prices multiplied by the volume of "reallocated" sales of pool milk.

8 of the United States Constitution[9] and that the regulation is not authorized by Oregon law (R 43). The circuit court, in a careful opinion, sustained those contentions (R 77), infra 31, and entered a judgment and decree declaring that the regulation is invalid and enjoining its enforcement (R 84). On appeal, appellees assigned its rulings as error, and the Supreme Court of Oregon reversed the decision of the circuit court, holding that the regulation does not unconstitutionally burden or regulate interstate commerce (R 88), infra 18-26.[10]

The judgment of the Supreme Court of Oregon sustained the validity of the regulation against appellants' contention that the same violated Article I, Section 8 of the United States Constitution, and the case is therefore within the appellate jurisdiction of this Court.

THE QUESTION IS SUBSTANTIAL[11]

The court below erroneously sustained a state administrative regulation which, as a matter of fact and law, substantially regulates and burdens interstate commerce for

9. Appellants also contended that the regulation violates provisions of the Constitution of Oregon and denies them and their out-of-state producers due process of law in violation of Amendment XIV to the United States Constitution (R 43-44). The trial court ignored these issues, and the Supreme Court of Oregon rejected appellants' claim, infra 28-29. This Court has clearly indicated that it will not entertain due process objections in these cases, and none will be asserted on this appeal. See *Polar Co. v. Andrews*, (1964) 375 US 361 at 370, fn 7.

10. It also held that the regulation is within the legislative authority delegated to the administrator by the statute, infra 26-28. That question, of course, is not before this Court.

11. Appellants also contend that the court below decided it in a way probably not in accord with applicable decisions of this Court. Rule 19.

the protection of local business in violation of Article I, Section 8 of the United States Constitution.

1. The regulation erects an unconstitutional trade barrier which substantially curtails the volume of interstate commerce to protect local economic interests.

a. The court below held, contrary to the trial court, that the regulation [12] does not constitute a trade barrier against the competition of milk imported from other states. It reasoned that by raising the blend price in the pool, the regulation will stimulate, not impair, interstate shipments, infra 22-23.[13] It ignored computations drawn from the record (App D and E, infra 43-50) which demonstrate the devastating impact of the regulation on processors' milk costs and appellants' capacity to continue to purchase and use out-of-state milk. Those computations establish that (1) the regulation, at all times and under all circumstances, sharply increases the direct cost of using imported milk and thereby neutralizes the natural economic advantage which it would otherwise enjoy by reason of its availability at lower

12. The holding of the court below that the administrator acted within his statutory delegated authority establishes that the regulation is a state "statute" within 28 USC § 1257(2). See cases cited supra, 3.

13. The basic flaw in the court's analysis lies in the fact that any increase in the market pool blend price caused by the regulation will not affect the processor's incentive to import. The processor does not pay the market pool blend price for pool milk; he pays a blend price determined at pool prices according to his individual use of it. While the regulation increases the blend price — and thus the cost — of pool milk to an importing processor to the extent that his Class 1 use of imported milk must be included in the pool, this will not increase his incentive to import; the increase consists entirely of money owed to the pool in addition to the interstate price. It is a penalty, not an incentive. See OAR 06-015, Ex 15.

prices in the states of origin; and (2) under a wide range of actual market conditions, the effect of the regulation on the relative cost of imported milk is so severe that it becomes more expensive for any use, measure for measure, than pool milk, even though its delivered price is lower than the Class 1 pool price. Carnation, the largest Oregon importer and a substantial competitor in that market, will be forced by the resulting economics to purchase all of its supplies from the local pool.

b. The protection of interstate commerce against local restrictions adopted under the police power which impede its flow or regulate essentially interstate problems for local purposes is one of the historic functions of this Court,[14] and its jurisdiction has consistently been exercised to protect interstate trade in Grade A milk against legislative and administrative systems which have "the aim and effect" of protecting local producers and processors from interstate competition.[15] In its simplest and most direct form, this principle forbids restrictions which substantially and adversely affect the volume of interstate trade. The "practical effect" of this

14. *Southern Pacific Co. v. Arizona*, (1945) 325 US 761 at 779-780:

> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.' * * *"

15. *Baldwin v. G.A.F. Seelig*, (1935) 294 US 511 at 527 (restriction on local sale of imported milk); *Hood v. DuMond*, (1949) 336 US 525 (restriction on milk exports to protect local processors' supplies); *Dean Milk Co. v. Madison*, supra, (1951) 340 US 349 (restriction on local sale of milk pasteurized elsewhere); *Polar Co. v. Andrews*, supra, (1964) 375 US 361 (restrictions on allocation of Class 1 use to imported milk).

protective regulation to greatly curtail the volume of interstate commerce, which was proved to a certainty, establishes its invalidity. See *Hood v. DuMond*, supra, (1949) 336 US 525 at 530-531.[16]

c. The regulation is not an exercise of the police power to protect the safety and health of Oregon citizens,[17] nor is it merely a neutral formula for determining the blend price of pool milk or its reporting in Class 2 usage.[18] On the contrary, its only purpose, which was proved in the record (Ex 8-11) and admitted by the court below, infra 21-22, is to protect the desired local producer price from interstate competition by including fluid use of imported milk in the processor's bill for pool milk. The effect of the regulation, as shown by the attached exhibits, infra 43-48, is to drastically reduce or destroy the incentive to import milk. That intention—to benefit and protect local business at the expense of interstate commerce—renders the regulation a prohibited discrimination against that commerce which invites destructive imitation and retaliation by others.[19] The

16. Apart from this, the court below concluded that the regulation will operate to protect the Oregon price from excessive Class 1 use of nonpool milk, infra 21-22. That conclusion establishes that its effect on interstate commerce is substantial and has constitutional significance. See *Hood v. DuMond*, supra, (1949) 336 US 525 at 539-540.

17. Cf *Dean Milk Co. v. Madison*, supra, (1951) 340 US 349.

18. See *Milk Board v. Eisenberg Co.*, (1939) 306 US 346; *Highland Farms Dairy v. Agnew*, (1937) 300 US 608; these decisions are inapplicable to milk regulations which seek to protect local producers. *Polar Co. v. Andrews*, supra, (1964) 375 US 361 at 378-379.

19. In addition to the milk cases cited above, fn 15, see, e.g., *Foster Packing Co. v. Haydel*, (1928) 278 US 1 at 12-14; *Penna. v. West Virginia*, (1923) 262 US 553 at 596-600; *Toomer v. Witsell*, (1948) 334 US 385 at 403-406.

regulation, in short, is an impermissible use of the police power which erects an economic barrier to the free importing and use of the products of other states to protect local business.

> "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin v. G.A.F. Seelig*, supra, (1935) 294 US 511 at 527

d. It is probably true, as the opinion of the court below suggests, infra 26-27, that interstate demand is generated in part by the Oregon two-price system and the high fixed Class 1 price which Oregon prescribes for its own producers. The resulting interstate market, however, is a legitimate one; under the controlling authorities, state power to protect local business from interstate competition is not created by a unilateral decision to erect a local system of high prices for local producers. In *Baldwin v. G.A.F. Seelig*, supra, (1935) 294 US 511 it undoubtedly was New York's system of high minimum prices payable for New York milk which generated the demand for Vermont milk. The issue in that case—and this—was whether the state, by indirect demands upon local processors, could protect those prices from the consequences of fixing them at levels above interstate prices. If this controlling constitutional prin-

ciple is to be changed to permit such bootstrap assertions of power over interstate commerce, the change should be announced by this Court.

e. The critical need for the Court to review the decision of the court below does not arise merely from the patent inadequacy of the economic analysis which that court adopted. The regulation, as the attached exhibits demonstrate, causes a substantial reduction in the benefits of purchasing interstate milk in all cases and will eliminate the largest Oregon milk importer from the interstate market.[20] The sharp impact of the regulation on the milk costs of an importing handler, the natural hazards and inconvenience of interstate purchases, and the impracticality of buying intermittently in the interstate market according to temporary changes in an individual processor's plant blend ratio make it clear that the regulation will ultimately destroy all interstate shipments into Oregon. Finally, if Oregon can erect an economic barrier to protect its producers, so can others. The substantial impairment of the national commerce resulting from the general adoption of such regulations by producer states — which will unquestionably follow affirmance of the lower court's judgment—is apparent,

20. The court below argued that appellants' decision to continue importing milk after the regulation was adopted proves that it will not affect the volume of imports, infra 23-24. However, the court itself pointed out, infra 23, that appellants have consistently disregarded the rule by continuing to allocate Class 1 use to imported milk in accordance with their actual use of it. In short, appellants have at all times treated the regulation as inoperative. Their continuing out-of-state purchases merely demonstrate their confidence that their legal position is correct and will ultimately be sustained.

2. The regulation imposes a rule for local protection upon an interstate problem which requires uniformity of regulation throughout the milkshed.

This regulation is a local reaction to problems assertedly arising from interstate commerce in Grade A milk; it is interstate commerce which has produced appellees' "problem," one which by its nature extends throughout the milkshed and affects all producers and processors operating in it. The regulation, however, imposes Oregon's internal policy on that commerce, solely to protect its own farmers, in such manner as substantially to eliminate Oregon as a market for producers of other states.

Problems arising from the existence of milk which is economically available across state lines require uniform regulation throughout the milkshed if there is to be equal treatment for all producers and all processors in it. The Commerce Clause forbids local regulation of such matters which disrupts interstate commerce,[21] and that principle, as applied to this case, is a part of the national legislative policy which authorizes interstate milk marketing pools under federal orders (7 USC § 608c(5)). That policy does not support or permit state milk regulations which destroy interstate commerce to

21. E. g., *Southern Pacific Co. v. Arizona*, supra, (1945) 325 US 761 at 767 768; *Bibb v. Nevada Freight Lines*, (1959) 359 US 520 at 529; *Morgan v. Virginia*, (1946) 328 US 373 at 386.

protect local interests from competition. See *Hood v. DuMond*, supra, (1949) 336 US 525 at 544-545.

3. The decision of the court below conflicts with *Polar Co. v. Andrews*.

The court below sought to distinguish *Polar Co. v. Andrews*, supra, (1964) 375 US 361 on the ground that the Florida system required purchases of Grade A milk from local producers as well as the allocation of Class 1 use by Florida processors to Florida milk. The Oregon regulation, it argues, controls only the "reporting" of the usage of Oregon milk[22] and does not directly regulate the importing of milk from other states, infra 25-26.

It should be clear, however, that the Oregon system, which goes farther than Florida's by requiring protective payments to local producers for Class 1 milk which they do *not* supply, is no better. After all, it is payment to local producers for milk used in Class 1 sales which both states seek, and a three-judge district court had sustained the Florida system on the exact ground that it did not directly regulate the importing of milk, (DC Fla 1962) 208 F Supp 899 at 902-903. Furthermore, the argument overlooks economic realities. At prevailing interstate prices, milk can be imported into Oregon

22. The court below suggests more than once that the regulation controls only the "reporting" of the usage of pool milk, infra 22, 27, 28-29. However, the processor's bill for pool milk is based on his "reported" usage, and the regulation, by requiring him to include Class 1 use of nonpool milk in that report, ties his local milk cost to his use of imported milk and sharply increases the cost of using the latter. See Appendices D and E.

only to the extent that it can be placed in fluid use outside the pool. The regulation requires part of that use to be included in the pool for the protection of pool producers. The "practical effect" of the Oregon system is identical with Florida's: it preempts a large share of the local fluid milk market for local producers and eliminates substantial interstate shipments (375 US at 376).

Polar Co. v. Andrews, supra, (1964) 375 US 361 is also dispositive of the suggestion, infra 27, that the regulation merely restricts the "reporting" of excessive Class 2 usage of local milk. This evasion of the constitutional command was expressly rejected by the Court in the following terms:

> "* * * Nor is it an escape from *Baldwin* to say that Polar has no interest in providing a satisfactory blend price as a basis for ongoing relationships with any out-of-state producer and that its only interest is in buying surplus milk at distress prices from out-of-state sources and selling it at Class I prices in the Florida market, all to the detriment of Florida producers and an orderly market. For this is but another assertion that a State may preempt its market for its own producers to the exclusion of production from other areas. * * *" (375 US at 377)[23]

23. *Baldwin v. G.A.F. Seelig*, supra, (1935) 294 US 511 at 527, which this Court approved and followed in *Polar*, held that the local sale of milk purchased in interstate commerce is "a common incident of ownership" which is protected by the Commerce Clause after arrival in the state of destination.

The demands of the Commerce Clause cannot be evaded by legislation which, though "nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." *S. C. Hwy. Dept. v. Barnwell Bros.*, (1937) 303 US 177 at 185-186.[24]

CONCLUSION

For the foregoing reasons, the nature of the case and the rulings of the court below bring it within the appellate jurisdiction of this Court under 28 USC § 1257(2), and the questions presented by this appeal are so substantial as to require the plenary consideration of the Court, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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January 24, 1967

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24. We note that this is the second case involving efforts of the Oregon legislature and appellee Department to protect local farm interests which has come before the Court this term. See *Short et al v. Ness Produce Co.*, affirmed January 16, 1967.

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OREGON

Arden Farms Co., a Delaware corporation, and Damascus Milk Company d/b/a Carnation Company, an Oregon corporation,

Respondents,

v.

State Department of Agriculture, J. F. Short and Kenneth F. Sawyer,

Appellants.

* * * * * * * *

GOODWIN, J.

This is a declaratory suit to test the validity of a milk-price-stabilization rule promulgated by the State Department of Agriculture under the authority of ORS 583.405 to 583.545. The Department appeals a decree striking down the regulation.

Plaintiffs are engaged in the processing and sale of dairy products. They operate processing plants in Oregon and import a substantial portion of their milk requirements from outside the state. The remainder of their requirements are obtained from producers within the state. Under ORS 583.006 (5) the plaintiffs are designated as "handlers."

In order to prevent the destruction of a state-wide milk-price-stabilization scheme, the Department promulgated Oregon Administrative Regulation 603-06-052,[1] which deals with the reporting by handlers of their plant utilization. Those handlers who use both Oregon-produced and foreign milk must report plant utilization of Oregon milk in the same proportion as their plant utilization of all milk for Class 1 (fluid milk) and Class 2 (cheese and other dairy products) uses regardless of their actual utilization of Oregon milk.[2] The circuit court held that the regulation was void on two counts: (1) it was an unconstitutional burden on interstate commerce; and (2) it was not authorized by statute. If the decree is right on either count it must be sustained.

It is not disputed that the legitimate exercise of a state's police power to protect the life, liberty, health or property of its citizens will be upheld against the claim of federal supremacy[3] even though the legislation

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1. Oregon Administrative Rules, ch 603, 06-052. "UTILIZATION OF MILK BY OREGON HANDLERS. (1) 'Class 1 utilization' for the purpose of this section, means the total utilization of all Class 1 milk (includes but not limited to all such milk purchased, received, processed or sold) by an Oregon handler or first handler located in or doing business in a market area where a market pool has been established, regardless of the source or the location of the producers of the milk.

"(2) Each Oregon handler shall allocate utilization to his Oregon suppliers on the same percentage basis as his actual total plant utilization of Class 1 and Class 2 milk."

2. The fact that milk is fungible makes the actual use of any given producer's milk irrelevant under a blend-price system.

3. United States Constitution.

Article VI: "* * * This Constitution, and the Laws of the United States

results in some incidental burden on interstate commerce. See Milk Board v. Eisenberg Co., 306 US 346, 59 S Ct 528, 83 L Ed 752 (1939). The initial inquiry must therefore be whether any burden on commerce attributable to OAR 603-06-052 is so great as to place the regulation at cross purposes with the commerce clause. Baldwin v. Seelig, 294 US 511, 55 S Ct 497, 79 L Ed 1032, 101 ALR 55 (1935).

The Oregon Milk Stabilization Act was adopted for the declared purpose of assuring a wholesome product for the benefit of the consuming public, providing the necessary assistance and authority to maintain a stable milk market, and sustaining the economy of the dairy industry and the economic welfare of the state of Oregon. ORS 583.410 (1). All of these are legitimate state purposes, Nebbia v. New York, 291 US 502, 54 S Ct 505, 78 L Ed 940, 89 ALR 1469 (1934); Baldwin v. Seelig, supra. See also Savage v. Martin, 161 Or 660, 91 P2d 273 (1939).

The legislative scheme, insofar as pertinent to the questions presented here, contemplates a bookkeeping "pool" of all milk produced by Oregon farmers so that

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which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *."

Article I § 8. "* * * The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *."

See Hood & Sons v. Du Mond, 336 US 525, 69 S Ct 657, 93 L Ed 865 (1937), striking down a New York order denying a license to a milk distributor solely to prevent the export of milk to Massachusetts.

each will receive the same "blend" price regardless of the actual use of his milk by the handler. Milk handlers are required to report to the state administrator their respective Class 1 and Class 2 sales of milk. Each handler is charged by the pool the minimum producer prices for Class 1 and Class 2 milk established by the Department for all milk allocated by the handler respectively to Class 1 and Class 2 use. The amounts used by all the handlers in the pool for Class 1 purposes and the amounts used by all the handlers in the pool for Class 2 purposes are then averaged to arrive at a "blend price" which the pool pays to all producers for the milk supplied by them. The milk handlers serve as paymasters for the pool in making the "blend" payment to the producers. It makes no difference to a producer in the market pool how much of his milk the handler to whom he sells actually uses for Class 1 purposes. The handler using more than the market pool average for Class 1 purposes will withhold some money from its producers for the benefit of producers selling to a handler with less than average Class 1 usage. Thus, all pool producers are ultimately paid the same price per unit for their milk regardless of the actual use to which their milk was put. This kind of equalization is the goal of the pool system.[4]

4. See Curley's Dairy v. Dept. of Agriculture, 82 Or Adv Sh 867, ____ Or ____, 415 P2d 740 (1966), for a description of the pool system and its stabilizing effect upon milk prices.

To illustrate the effect of the challenged regulation within the context of the statutory scheme, suppose a handler who processes 100 units of milk is able to import only 40 units of foreign milk per month and must purchase his remaining 60 units from local producers. He operates at a plant-capacity level which makes it most profitable for him to allocate 50 units to Class 1 use and 50 units to Class 2 use. Without the regulation, a handler could buy foreign milk at lower prices than the pool price for domestic milk. He could allocate all 40 units (or 100%) of his foreign milk to Class 1 use. He then could allocate 10 units of his domestic milk to Class 1 use to make his 50 units for Class 1 purposes. Finally, he could allocate the remaining 50 domestic units to Class 2 use.

The challenged regulation requires that for purposes of a determination by the domestic market administrator of the price to be paid for the milk purchased from domestic producers, a handler must report Class 1 allocation of domestic milk on the same percentage basis as his actual total plant allocation of Class 1 milk (i.e. 50%). Thus, he must report for purposes of determining the domestic price that he has allocated 30 domestic units (50% of 60 units of domestic milk) to Class 1 use and 30 domestic units to Class 2 use. The result of such report will tend to elevate the "blend price" which must be paid to all domestic producers. Presumably the blend

price would have been depressed if the handler were allowed to report that all but 10 units of his domestic milk had been allocated to Class 2 uses. The regulation, therefore, does not permit a handler who avails himself of both domestic and foreign milk supplies to depress the Oregon pool, or the blend price, by reporting most of his domestic milk purchases as utilized for his Class 2 requirements.

Regardless of the amount of domestic milk which the handler actually allocates to Class 1, he must report to the Department as if he had allocated a percentage of domestic milk for Class 1 use equivalent to the proportionate amount of his total milk supply which he actually allocates to Class 1 use; and he must pay the blend price for his domestic milk regardless of his actual utilization of domestic milk.

Plaintiffs argue that the only course of action remaining open to them under the regulation is to reduce their volume of imported milk.

However, it is an economic fact of life that the volume of foreign milk the handler will buy will depend primarily on the differential between the domestic blend price and the foreign wholesale price plus extra transportation costs, if any. Rather than to inhibit importation of foreign milk, the regulation would encourage it. A plant with a high volume of Class 1 utili-

zation reporting its figures to the Oregon administrator in accordance with the regulation would tend to drive the Oregon blend price upward. This would result in a greater spread between the Oregon blend price and the presumably cheaper price elsewhere, encouraging the handler to seek the cheaper milk outside the state. At some point, of course, the influx of milk might produce plant surpluses which would force the plant to a higher volume of Class 2 utilization, but this would not be caused in any sense by the Oregon regulation.

In the case at bar, for example, the trial exhibits reveal that neither plaintiff has reduced its purchases from foreign producers since the publication of the challenged regulation. On the contrary, with the exception of Arden's out-of-state purchases in March, 1965, both handlers have increased the amounts of foreign milk bought monthly over corresponding months in 1964. Furthermore, the record shows that Carnation has not varied its practice of allocating 100% of foreign milk to Class 1 use, and Arden Farms, as late as April, 1965 allocated 93.89% of foreign milk to Class 1 use. Other potential variables, such as minimum prices in Oregon and the market-pool ratio of Class 1 to Class 2 use, have remained constant. The fact that foreign-milk purchases have risen since the publication of the regulation, without any change in the other possible variables, directly contradicts the assertion that the regulation has caused

discrimination against, or an unreasonable burden upon, interstate commerce. There is thus no factual support for the claim that Oregon has erected a trade barrier against competition from neighboring states.

The case of Polar Co. v. Andrews, 375 US 361, 84 S Ct 378, 11 L Ed2d 389 (1964), is distinguishable from the present case. The statute which was successfully challenged on commerce grounds in the *Polar* case provided, first, that any milk distributor in the Pensacola (Florida) Milk Marketing Area must pay a minimum price of 61 cents per gallon for all milk purchased from Pensacola producers and sold in Florida as "Class I" milk. Second, it established a method of allocation which resulted in all of Polar's Class I sales being attributed solely to its Pensacola producers. These statutory provisions had been construed to mean as well that a Florida distributor in a regulated marketing area must accept from his local producers all the milk tendered, including milk in excess of Class I needs. Finally, it prohibited termination (except for cause) of business relationships between a distributor and producer with whom the distributor has had a continuous course of dealings. The court, interpreting the statute, wrote:

> "Under the controls challenged here, Polar must buy from its Florida producers, and pay 61 cents per gallon for it, an amount of raw milk equal to its Class I sales if it is available from these producers. If more than this amount is offered, Polar must also

take the surplus at the lower established prices. And these obligations continue to bind Polar even though both its Class I needs and the surplus obtainable from Florida producers may steadily increase. Polar obviously will not and cannot use outside milk for those uses for which it is required to use Florida milk. Polar may turn to out-of-state sources only after exhausting the supply offered by its Pensacola producers. Under the challenged regulations, an Alabama dairy farmer could not become one of Polar's regular producers and sell all of his milk to that company. Since he could not share in the Class I market—Pensacola producers are probably able to supply that market—his milk could command only the lower prices applicable to the less remunerative uses, prices which would not cover his cost of production." Polar Co. v. Andrews, 375 US at 375-376.

Florida attempted to pre-empt its market for its own producers to the exclusion of production from other areas. The attempt to prohibit the introduction within her territory of milk of wholesome quality acquired in another state was a direct burden on commerce.

In the case at bar the regulation has been aimed only at the reporting of utilization of foreign milk in such a way as to destroy the Oregon price structure.[5] No restriction has been placed upon the quantity of milk imported from out of state. Neither has any restriction been placed upon prices that must be paid for foreign milk. The decision of any Oregon handler, in view

5. The challenged regulation has no application to an Oregon handler which imports 100% of its milk requirements from other states.

of economic realities, to import milk or to buy from local producers has not been altered by this regulation.

To come within the holding of the *Polar* case, Oregon's challenged regulation would have to require that handlers must purchase a minimum amount of Oregon-produced milk at Class 1 prices before the handlers could look to secondary sources of supply. This the Oregon regulation does not do. We are satisfied that any burden upon interstate commerce incidental to the preservation of the Oregon market pool is so negligible as to be barren of federal constitutional significance.

Contending that the Department is without authority to promulgate the challenged regulations, plaintiffs cite many cases for general propositions of statutory interpretation, none of which require this court to adopt their point of view. Simply stated, they argue that the legislature never intended to delegate authority to the Department of Agriculture to enact regulations which would assure a high or stable price structure for local producers of milk. The statute, according to this argument, merely provides a system of equalization and an agency to handle the accounting. If more had been intended, say the plaintiffs, the legislature would have been more specific.

The prime reason for rejecting this argument is that the whole system of equalization and the attempt to

assure a sound market for local producers could be undermined if handlers were permitted to take advantage of the legislatively supported Class 1 retail market and at the same time actively depress the blend prices to be paid Oregon producers.

It is clear that the Department seeks only to inhibit plaintiffs from using Oregon-produced milk for the purpose of depressing the Oregon blend price by allocating such milk almost entirely to Class 2 sales. The rule does not reduce competition from foreign producers nor does it regulate actual use of foreign milk by Oregon handlers. The rule requires, in the interest of price stability, that Oregon handlers do not report usage of Oregon milk for Class 2 purposes at a percentage rate grossly disproportionate from their actual plant-utilization ratio for all milk.

The legislature, intending primarily to stabilize the market for producers, expressly clothed the Department with broad authority to make rules to maintain a stable milk market and to sustain the economy of the dairy industry. ORS 583.410. The manner in which the Department is to undertake the task (that is, through minimum prices, quotas, equalization, and market pooling) is found in ORS 583.505, 583.510, and 583.515. The Department's rule-making authority, found in ORS 583.026, provides:

"* * * [T]he department shall * * *

"* * * * *

"(b) Promulgate rules and regulations * * * after a public hearing relating to milk pooling, classification of use, allocation of classification, producer payments and contracts and such other rules as are reasonable and necessary for the enforcement of ORS 583.006 to 583.166

"* * * * * *"

ORS 583.410 (2) provides:

"The provisions of ORS 583.002, 583.004, and 583.405 to 583.545 are in pari materia with the provisions of ORS 583.006 to 583.166 * * *."

We hold that the challenged rule is necessary, reasonable, and proper for the enforcement of the Oregon milk-marketing laws. Curly's Dairy v. Dept. of Agriculture, 82 Or Adv Sh 867, ___ Or ___, 415 P2d 740 (1966).

The rule bears a reasonable relation to the accomplishment of a valid legislative purpose. It is not arbitrary. There is no discrimination among handlers, since the formula treats all in the same class alike. Handlers who import all of their milk are exempt from the regulation. All handlers who import a portion of their requirements from foreign states and purchase the remainder of their needs from Oregon producers are treated alike. They are forbidden to use their Oregon

purchases to depress the Oregon blend price. See Bailey Farm Dairy Co. v. Anderson, 157 P2d 87 (8th Cir), cert. denied, 329 US 788, 67 S Ct 355, 91 L Ed 675 (1946). See also Pressman v. Barnes, 209 Md 544, 555, 121 A2d 816, 822 (1956).

The decree is reversed.

* * * * *

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 3rd day of OCTOBER 1966, WHEREUPON on this WEDNESDAY, the 23rd day of NOVEMBER 1966, the same being the 22nd judicial day of said term, when the following proceedings were had:

ARDEN FARMS CO., a Deleware corporation, and DAMASCUS MILK COMPANY, d/b/a CARNATION COMPANY, an Oregon corporation, Respondents	)	
v.	)	Appeal from MARION County
STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER, Appellants	)	

This cause on September 9, 1966, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for

further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the declaratory judgment and decree of the court below rendered and entered in this cause be and the same hereby is in all things reversed and set aside. * * *

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MARION COUNTY

NO. 57499

ARDEN FARMS CO., a Delaware corporation, and DAMASCUS MILK COMPANY, dba CARNATION COMPANY, an Oregon corporation,
Plaintiffs,
vs.
STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER,
Defendants

MEMORANDUM DECISION

This is a suit for declaratory judgment and injunctive relief. The controversy concerns the Department of Agriculture Administrative Order AD 17-64 of October 1964, which was promulgated by defendants under the Oregon Milk Stabilization Act of 1963. Plaintiffs seek to have AD 17-64 declared invalid and the defendants enjoined from any attempt to enforce it against them.

Plaintiff Damascus Milk Company, doing business as Carnation Company, is an Oregon corporation engaged in purchasing, processing and selling fluid milk. Plaintiff Arden Farms Co. is a Delaware corporation authorized to do business in Oregon and also is engaged

in purchasing, processing and selling milk. Both plaintiffs are Oregon milk handlers subject to ORS 583.405 to 583.545, which has become known as the Milk Stabilization Act. Both purchase some of their milk from out-of-state producers and process it in Oregon. Defendant State Department of Agriculture administers the Milk Stabilization Act. Defendant J. R. Short is the Director and defendant Kenneth F. Sawyer is the Chief of the milk audit and stabilization division of the Department.

Since October 1, 1963, the Department of Agriculture has operated a milk market pool under the Stabilization Act throughout the State of Oregon (except in Curry, Malheur and Harney Counties). The Department assigns "quotas" to milk producers in the market pool, fixes prices to producers, and operates a system of equalization of payments.

The purpose of the market pool and of equalization is to assure that each producer receives the same blend price for the total quota milk he delivers to the handler as other pool producers receive for their quota milk. Quota milk used as a fluid milk commands a higher price than other milk, and such use is defined as Class 1 utilization. Use of milk in manufactured dairy products brings a lower price and is classified as Class 2 utilization. The blend price ultimately received by producers is an averaging of the Class 1 and Class 2 prices for the

total amount of quota milk put to the two uses during the period. The blend price decreases as the amount of quota milk utilized as Class 1 in the market pool decreases. Quotas are assigned to Oregon producers and to producers outside Oregon who have elected to participate in the Oregon market pool. Producers outside the State who have not chosen to participate in the pool are not assigned quotas and their sales of milk to Oregon handlers are not regulated under the Stabilization Act.

The cause in question was submitted to the Court on the pleadings, stipulations and exhibits filed in the case, without further trial or evidence. Written arguments were filed by both sides. The pleadings and stipulations consist of an amended complaint and amended answer; stipulation filed on August 13, 1965, with exhibits I through IV; another stipulation filed on August 13, 1965, with an attached schedule; and a second supplemental stipulation filed on September 17, 1965; all of which stipulations are received. Exhibits offered in evidence are numbered 1 through 18, and all are admitted.

The plaintiffs contend that the State Department of Agriculture cannot require an Oregon milk handler who uses both imported and local milk to allocate utilization of Class 1 milk to his Oregon pool suppliers on the same percentage basis as his actual total plant utilization when, in fact, the Oregon suppliers did not supply that

much of the milk used as Class 1, for the reason that the handler had utilized more than that percentage amount of his nonpool, out-of-state milk as Class 1. Plaintiffs argue that such a requirement is not authorized by the Milk Stabilization Act and, furthermore, that it is unconstitutional.

Defendants, on the other hand, contend that an Oregon handler who purchases both pool and nonpool milk must not be permitted to discriminate against the pool producers by allocating all or most of his nonpool, out-of-state milk to Class 1 use and most of his pool milk to Class 2 use. Defendants argue that AD 17-64 does not apply to out-of-state milk and does not tell an Oregon handler what he must do with his out-of-state milk, but that it only tells the handler what he must do with his Oregon milk. Defendants contend that the rule does not violate the Constitution and that the department has authority to promulgate it.

The court has carefully studied the pleadings, stipulations, exhibits and arguments and makes the following

FINDINGS AND CONCLUSIONS

Section 3 of rule AD 17-64, defines Class 1 utilization as "the total utilization of all Class 1 milk by an Oregon handler—regardless of the source or location of the producers of the milk." It further provides that each Ore-

gon handler "shall allocate utilization to his Oregon suppliers on the same percentage basis as his actual total plant utilization of Class 1 and Class 2 milk."

The basic issue in the case is whether or not the Department of Agriculture can promulgate such a rule —which, in effect, requires an Oregon handler who obtains part of his milk from nonpool, out-of-state sources, to allocate utilization of such out-of-state milk between Class 1 and Class 2 uses (at least for the purposes of equalization payments to pool producers) on the same percentage basis as he allocates utilization to his pool suppliers for Class 1 and Class 2 use.

The rule does not outlaw out-of-state milk nor regulate out-of-state producers, nor does it fix a price for out-of-state milk. In fact, it does not necessarily tell a handler how he must use his out-of-state milk. It does tell an Oregon handler that he cannot buy from both pool producers and nonpool producers and then allocate a greater percentage of Class 1 use to out-of-state milk than he allocates to pool milk. The actual and ultimate effect of the rule is to require pooling of out-of-state, nonpool milk with pool milk as if it were from pool producers, except that the nonpool producers do not share in equalization. If the milk from the two sources is not physically pooled, it must be reported as if it had been physically pooled, which, in effect and law, amounts to the same thing.

It is the opinion of the Court that such a rule is not authorized by the Milk Stabilization Act. The Oregon act provides that handlers must purchase milk from pool producers for not less than the minimum established prices and that the accounting and payments for such milk shall be pooled in utilization reports to the Department of Agriculture as they actually occurred so that a blend price and proper equalization payments can be computed. The Act authorizes regulation and pooling of pool milk only. Milk imported from out of state is not to be included in the pool or in the computations, except by consent of the outside porducers.

Rule AD 17-64, in practical effect, however, includes out-of-state milk. To say that each Oregon handler, who purchases and uses both local and out-of-state milk, shall allocate utilization to his Oregon suppliers on the same percentage basis as his actual total plant utilization of Class 1 and Class 2 milk, is the same as to say that such a handler shall allocate utilization of his out-of-state milk on the same percentage basis as his actual plant utilization; or is the same as saying that such a handler shall not allocate more out-of-state milk to Class 1 use than he allocates local milk to Class 1 use. The rule thus does apply to out-of-state milk. It attempts to regulate and limit utilization of milk imported from out-of-state contrary to both State and Federal law.

The fact that the handler may be permitted to utilize the milk differently than the rule directs so long as he reports to the Department as if he had utilized it according to the rule, is immaterial. If he has to report equal use, his reason for unequal use is denied him, and the rule therefore becomes a regulation of out-of-state milk. Also, the rule is out of harmony with the Stabilization Act, because its effect is to limit reporting of the utilization of Oregon milk for Class 1 use to the same percentage basis as overall plant utilization even if, in fact, the handler utilized a much greater percentage of Oregon milk as Class 1.

The Stabilization Act specifically provides that it shall not apply to interstate commerce. Although AD 17-64 professes to apply only to pool milk, its purpose and effect is to limit interstate commerce by discouraging Oregon handlers from purchasing out-of-state milk for Class 1 utilization and denying out-of-state milk a competitive advantage it might otherwise have. The only reason AD 17-64 was promulgated was that Oregon handlers were importing milk and giving it first priority for Class 1 utilization. The only purpose of the rule was to discourage and reduce that practice. The rule was created to protect Oregon producers from out-of-state competition and to reserve to them a substantial share of the milk market. It tells the Oregon handler what to

do for his Oregon producers if he also buys out-of-state milk, and what it tells him to do has a direct and adverse effect upon his purchase and use of milk imported from other states. This amounts to a regulation of, and a burden upon, interstate commerce. A state cannot discriminate against interstate commerce by erecting an economic barrier to protect a local industry from competition from outside.

The Oregon Milk Stabilization Act may be used to reduce internal competition for Class 1 sales, but it cannot be used to restrict Class 1 use of nonpool, out-of-state milk. A handler has a right to purchase wholesome out-of-state milk and to use it as he wishes, even to the partial or complete exclusion of local milk. He cannot be assessed, penalized, or charged a tariff for such importation and use, and he cannot be made to preserve a part of his market for Oregon milk or to give Oregon milk preferential or even equal treatment with out-of-state milk. He may be required to handle imported milk so it will be a wholesome product, and he may be required to report what use and allocation he makes of it or to otherwise justify his reports of allocation of pool milk, but he may not be required to restrict his use or allocation of out-of-state milk or to report a portion of his actual known utilization of imported milk to the credit of pool milk.

Defendants argue that AD 17-64 is the only fair way to administer the market pool in the face of handlers buying and using both pool and nonpool milk. The question before the Court is not what is or is not a fair practice in the trade, but whether or not AD 17-64 can be upheld as a valid and enforceable rule of the Department of Agriculture. The fairness or unfairness of the rule does not make it either lawful or unlawful. Legality of administrative action is founded on valid statutory authority subject to limitations imposed by the State and Federal Constitutions.

It is the decision of the Court that the Department of Agriculture does not have authority to promulgate or administer Administrative Order No. AD 17-64, and that the order as applied to plaintiffs' business is invalid and unenforceable, and that defendants should be permanently enjoined from enforcing said order against the plaintiffs.

Counsel for plaintiffs will please prepare an appropriate form of judgment order and decree in accordance with the above opinion and decision.

LOREN HICKS

Circuit Judge

Dated at Salem, Oregon, this 20th day of January, 1966.

APPENDIX C

Administrative Order No. AD 17-64

(Excluding immaterial portions thereof.)

SECTION 1. RELATING TO SECTIONS 2 AND 3.

For the purpose of this section "pool producers" means producers who have quotas allocated by the department and whose milk is included in the market pool. "Nonpool producers" means those who do not have quota allocated by the department and whose milk is not included in the market pool. A few Oregon milk handlers have attempted to circumvent and thwart the purpose and intent of the law by allocation of plant usage unequally to pool and nonpool producers, in some instances giving 100% Class 1 usage to nonpool producers, thereby forcing all of their Class 2 usage onto pool producers. To allocate usage on other than an equal basis is a practice that is unfair, unjust, inequitable, destructive and demoralizing to the milk industry.

If not immediately stopped, it can only lead to bankruptcy for many of the pool producers and result in chaos and confusion. Every single purpose and intent of the Milk Audit and Stabilization Law, ORS chapter 583, has been ignored and flaunted by such few handlers. Sections 2 and 3 of this order only reaffirm and carry out such purposes and intent: "To insure a whole-

some product for the benefit of the consuming public, to provide necessary assistance and authority to maintain a stable milk market, to sustain the economy of the dairy industry and the economic welfare of the State of Oregon and to assure an adequate and healthful supply of milk and milk products for the consuming public." Pool producers expect, and they only ask for the same fair, reasonable and equitable treatment that can be, and should be given to all producers who furnish milk to a handler, regardless of the location of such producers.

SECTION 2. OUT OF STATE PRODUCERS MAY PARTICIPATE IN THE OREGON POOL.

OAR 603-06-050 is amended to read:

(1) An out of state producer supplying milk to an Oregon handler may be assigned quota and participate in market-wide pooling and equalization on the same basis as an Oregon producer, providing a voluntary contract exists between the out of state producer and his Oregon handler, or in the case of a cooperative handler by resolution of the governing board, which provides that the producer's milk be subject to the jurisdiction of the State of Oregon and share in all the benefits and obligations under all the terms and conditions of ORS chapter 583. In event of such a contract, milk produced by the out of state producer may be pooled with milk from Oregon producers on the same basis as if it were produced in Oregon.

(2) * * * * *

SECTION 3. UTILIZATION OF MILK BY OREGON HANDLERS.

(1) "Class 1 utilization" for the purpose of this section, means the total utilization of all Class 1 milk (includes but not limited to all such milk purchased, received, processed or sold) by an Oregon handler or first handler located in or doing business in a market area where a market pool has been established, regardless of the source or the location of the producers of the milk.

(2) Each Oregon handler shall allocate utilization to his Oregon suppliers on the same percentage basis as his actual total plant utilization of Class 1 and Class 2 milk.

APPENDIX D

Effect of Regulation on Total Cost of Milk to Importing Processor

The following calculations are based on an assumed total plant requirement of 1000 cwt of raw milk, and they demonstrate the effect of the regulation on a processor's total milk costs if it imports a volume of milk equal to 30% of its requirements.[1] That effect has been determined at three levels of interstate prices:

$4.90 per cwt, which is approximately the median price paid by Carnation for interstate milk;

$4.535, which is the lowest price Carnation paid;

$5.26, which is the highest price Carnation paid (R 57).

The prices for pool milk are those in effect after September, 1964:

Class 1 price of pool milk	$5.40
Class 2 price of pool milk	$3.20[2] (R 66)

In reviewing these figures, it must be remembered

1. We have used 30%, because this is the level of Carnation's imports (R 63) which the court below concluded will be maintained or increased by the regulation, supra 22-24. However, the only significance of postulating a higher or lower level of imports lies in the larger or smaller number of dollars involved; the adverse effect of the regulation on interstate purchases is present in all cases.

2. These are the pool prices most favorable to appellees. At the lower pool prices, which prevailed until September, 1964 (R 66) the adverse impact of the rule would be substantially greater.

that Carnation's plant blend ratio of Class 1 use from June, 1964 through June, 1965 averaged less than 62%. It did not reach 70% after March, 1964, and it varied from 55.4% to 68.4% during that period. During four months it fell below 57% (R 64).

The exhibit shows that under the regulation an importing processor's plant blend ratio must be over 78% before it can import any milk at the median price of $4.90; if the interstate price should again fall to $4.535, its lowest level since October 1, 1963, the minimum plant ratio permitting the processor to enter the interstate market will be between 58% and 59%; at $5.26, the highest price paid by Carnation, a processor can only import milk if its plant blend ratio is well over 80%. All interstate prices are lower than the pool price for Class 1 milk.

I.

(80% plant ratio of Class 1 use)

1. If all milk is purchased from pool.

800 cwt at $5.40	$4320
200 cwt at $3.20	640
Total cost	$4960

2. If 30% is imported and used as Class 1 outside pool.

	at $4.90	at $4.535	at $5.26
300 cwt (imported)	$1470	$1360.50	$1578
500 cwt (from pool) for Class 1 use at $5.40	2700	2700.00	2700
200 cwt (from pool) for Class 2 use at $3.20	640	640.00	640
Total cost	$4810	$4700.50	$4918

3. If 30% is imported and rule is applied.

	at $4.90	at $4.535	at $5.26
300 cwt (imported)	$1470	$1360.50	$1578
80% x 700 x $5.40	3024	3024.00	3024
20% x 700 x $3.20	448	448.00	448
Total cost	$4942	$4832.50	$5050
Total penalty imposed by rule	**$ 132**	**$ 132.00**	**$ 132**
Comparison with cost of full supply from pool	**— 18**	**— 127.50**	**+ 90**

II.

(70% plant ratio of Class 1 use)

1. If all milk is purchased from pool.

700 cwt at $5.40	$3780
300 cwt at $3.20	960
Total cost	$4740

2. If 30% is imported and used as Class 1 outside pool.

	at $4.90	at $4.535	at $5.26
300 cwt (imported)	$1470	$1360.50	$1578
400 cwt (from pool) for Class 1 use at $5.40	2160	2160.00	2160
300 cwt (from pool) for Class 2 use at $3.20	960	960.00	960
Total cost	$4590	$4480.50	$4698

3. If 30% is imported and rule is applied.

	at $4.90	at $4.535	at $5.26
300 cwt (imported)	$1470	$1360.50	$1578
70% x 700 x $5.40	2646	2646.00	2646
30% x 700 x $3.20	672	672.00	672
Total cost	$4788	$4678.50	$4896
Total penalty imposed by rule	**$ 198**	**$ 198.00**	**$ 198**
Comparison with cost of full supply from pool	**+ 48**	**— 61.50**	**+ 156**

III.

(60% plant ratio of Class 1 use)

1. If all milk is purchased from the pool.

600 cwt at $5.40	$3240
400 cwt at $3.20	1280
Total cost	$4520

2. If 30% is imported and used as Class 1 outside pool.

	at $4.90	at $4.535	at $5.26
300 cwt (imported)	$1470	$1360.50	$1578
300 cwt (from pool) for Class 1 use at $5.40	1620	1620.00	1620
400 cwt (from pool) for Class 2 use at $3.20	1280	1280.00	1280
Total cost	$4370	$4260.50	$4478

3. If 30% is imported and rule is applied.

	at $4.90	at $4.535	at $5.26
300 cwt (imported)	$1470	$1360.50	$1578
60% x 700 x $5.40	2268	2268.00	2268
40% x 700 x $3.20	896	896.00	896
Total cost	$4634	$4524.50	$4742
Total penalty imposed by rule	**$ 264**	**$ 264.00**	**$ 264**
Comparison with cost of full supply from pool	**+ 114**	**— 4.50**	**+ 222**

IV.

(50% plant ratio of Class 1 use)

1. If all milk is purchased from pool.

500 cwt at $5.40	$2700
500 cwt at $3.20	1600
Total cost	$4300

2. If 30% is imported and used as Class 1 outside pool.

	at $4.90	at $4.535	at $5.26
300 cwt (imported)	$1440	$1360.50	$1578
200 cwt (from pool) for Class 1 use at $5.40	1080	1080.00	1080
500 cwt (from pool) for Class 2 use at $3.20	1600	1600.00	1600
Total cost	$4150	$4040.50	$4258

3. If 30% is imported and rule is applied.

	at $4.90	at $4.535	at $5.26
300 cwt (imported)	$1440	$1360.50	$1578
50% x 700 x $5.40	1890	1890.00	1890
50% x 700 x $3.20	1120	1120.00	1120
Total cost	$4480	$4370.50	$4588
Total penalty imposed by rule	**$ 330**	**$ 330.00**	**$ 330**
Comparison with cost of full supply from pool	**+ 180**	**+ 70.50**	**+ 288**

APPENDIX E

Losses Sustained by Carnation on Imported Milk under the Regulation

In Appendix E, the calculations in Appendix D have been applied to Carnation's actual monthly imports for fluid use (R 63) and monthly plant ratios (R 64) at its median interstate price (R 57) for the period October, 1963 through June, 1965. This exhibit shows that under the rule Carnation would supply its needs most cheaply each month by buying only pool milk. The total amount of this excess cost imposed by the rule after it became effective on November 1, 1964 was $37,569.30 on total imports of 12,215,398 pounds or slightly more than 3¢ per cwt. The amount varies each month with Carnation's plant blend ratio and the amount imported, ranging from $3,015.13 (in December, 1964) to $6,599.74 (in June, 1965).

Month	Volume of Out-of-State Milk Purchased By Carnation	Carnation's Median Out-of-State Price	Pool Class I Price	Pool Class II Price	Carnation's Class I Plant Ratio	Carnation's Class II Plant Ratio	Comparison of Total Milk Cost Under Rule With Cost of Full Supply From Pool
10/63	365,569 lb.	$4.90 cwt	$5.30 cwt	$2.90 cwt	.729	.271	+ $ 915.38
11/63	340,819	"	"	"	.746	.254	+ 714.36
12/63	431,328	"	"	"	.796	.204	+ 386.47
1/64	1,396,536	"	"	"	.759	.241	+ 2,491.42
2/64	857,890	"	"	"	.694	.306	+ 2,858.78
3/64	672,095	"	"	"	.704	.296	+ 2,086.18
4/64	852,032	"	"	"	.677	.323	+ 3,196.82
5/64	1,160,537	"	"	"	.672	.328	+ 4,493.60
6/64	1,081,797	"	"	"	.569	.431	+ 6,858.59
7/64	1,089,082	"	"	"	.556	.444	+ 7,253.29
8/64	1,392,294	"	"	"	.567	.433	+ 8,896.76
9/64	1,584,512	"	$5.40 cwt	$3.20 cwt	.637	.363	+ 4,731.35
10/64	1,533,763	"	"	"	.657	.343	+ 3,904.96
11/64	1,580,136	"	"	"	.672	.328	+ 3,501.58
12/64	1,544,638	"	"	"	.684	.316	+ 3,015.13
1/65	1,686,102	"	"	"	.677	.323	+ 3,500.93
2/65	1,496,705	"	"	"	.633	.367	+ 4,600.87
3/65	1,705,061	"	"	"	.610	.390	+ 6,104.12
4/65	1,442,621	"	"	"	.610	.390	+ 5,164.58
5/65	1,388,617	"	"	"	.608	.392	+ 5,032.35
6/65	1,371,518	"	"	"	.554	.446	+ 6,599.74
Total	**24,973,648**						**+ $86,367.26**
Total, 11/64 through 6/65	**12,215,398**						**+ $37,569.30**

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In the Supreme Court of the United States

No. 1004
OCTOBER TERM, 1966

ARDEN FARMS CO., a Delaware corporation, and DAMASCUS MILK COMPANY dba CARNATION COMPANY, an Oregon corporation,

Appellants,

v.

STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER,

Appellees.

On appeal from the Supreme Court of the State of Oregon

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully move this Court to dismiss the above entitled appeal or, in the alternative to affirm the decision of the Supreme Court of the State of Oregon, on the grounds that said appeal does not present a substantial federal question, that the appeal is based upon non-reviewable grounds and that the decision of the Supreme Court of the State of Oregon rests upon an adequate, nonfederal basis.

STATEMENT

This is an appeal from a judgment of the Supreme

Court of the State of Oregon of November 23, 1966 and reported in 83 Or Adv Sh 543, 420 P2d 379. Appellants' petition for rehearing in said Court was denied on December 20, 1966. As stated in appellants' jurisdictional statement (page 7, footnote 9), the appellants attacked the administrative regulation on more than just a violation of the Commerce Clause, Article I, Section 8, namely that such regulation is without statutory authority; that such regulation is an unreasonable use of any delegated power; that such regulation denies the appellants and their out-of-state producers due process of law in violation of the XIV Amendment to the U. S. Constitution, and is in violation of Article I, Section 21, Article IV, Section 1 and Article I, Section 20 of the Constitution of Oregon.

The trial court opinion found the regulation a violation of the Commerce Clause and also that it was without statutory authority (Jur St, page 39). The Supreme Court of Oregon found such regulation did not violate the Commerce Clause and that the regulation was necessary, reasonable and proper under the statutory authority (Jur St, page 28).

These nonfederal issues were considered and determined by the state courts and were and are determinative of the cause here presented.

The Oregon milk stabilization program goals and the system of determining milk producers' prices are set out succinctly in the opinion of the Oregon Supreme Court (Jur St, pages 19-21). The questioned regulation requires milk handlers who use Oregon pool milk and also non-

pool milk[1] to report to the appellees their usage of milk on a total plant basis—the percentage of all milk used as Class 1 and that used as Class 2. This ratio of Class 1 and Class 2 is then applied to their usage of Oregon pool milk so that no arbitrary classification may be made by such handlers. The pool milk and nonpool milk receive the same percentage of the high and low priced classes as the handler *actually used* in his plant. The appellants are within this type of handler. It should be recognized and emphasized that handlers using nonpool milk totally are not subjected to this questioned regulation at all, as usage of Oregon milk is not affected nor is the Oregon pool producers' "blend" price.

It should further be clarified that out-of-state milk producers are not barred from participation in the Oregon stabilization program. Any non-resident producer desiring to supply the Oregon market may voluntarily join in the Oregon system and be allocated quota the same as if he were located in Oregon. The interpretation placed upon the questioned regulation by the appellants (Jur St, pages 8 and 12) that "the regulation, at all times and under all circumstances * * * neutralizes the natural economic advantage * * *" and that it "* * * will eliminate the largest Oregon milk importer from the

---

[1] This may be of out-of-state origin or out-of-pool origin. The Oregon Market Area No. 1 does not include all counties in Oregon.

[2] At this writing, the Oregon pool consists of a total of 1114 producers sharing in the benefits of the Oregon stabilization program. Of this total, 237 are out-of-state producers who have joined voluntarily. About 70 out-of-state producers supply Oregon handlers without joining this Oregon pool plan.

interstate market.", is contra to existing facts as well as the opinion of the Oregon Supreme Court. High Class 1 plant usage would prove beneficial to handlers using nonpool, or out-of-state milk.

ARGUMENT

1. The construction of a state statute or regulation by a state court is not reviewable by this Court either by appeal or certiorari.

The Oregon Supreme Court rendered its decision upholding the validity of this questioned regulation after necessarily construing the same. Where the validity of such regulation has been sustained in the face of federal objections, this Court must accept the Oregon Supreme Court's analysis, or construction, of the same. That the appellants principally appeal on the basis of the construction placed upon the regulation by the Oregon Supreme Court is evidenced throughout their jurisdictional statement, and is openly admitted in their statement (Jur St, page 12) that "the patent inadequacy of the economic analysis which that [Oregon] court adopted" is a reason for this appeal.

As stated in *Kingsley International Pictures Corp. v. Regents*, 360 US 684 (1959) at 688:

> "We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals [of New York] has put upon it. *Albertson v. Millard*, 345 US 242; *United States v. Burnison*, 339 US 87; *Aero Mayflower Transit Co. v. Board of R.R. Comm'rs.*, 332 US 495."

As recent as 1965, the Court stated in *Shuttlesworth v. City of Birmingham*, 382 US 87 (1965) at 91:

> "The Alabama Court of Appeals has thus authoritatively ruled * * *. It is our duty, or course, to accept this state judicial construction of the ordinance. *Winters v. New York*, 333 US 507; *United States v. Burnison*, 339 US 87; *Aero Mayflower Transit Co. v. Board of R.R. Commrs'.*, 332 US 495."

The same application of principle was made in *Guaranty Trust Co. v. Blodgett*, 287 US 509 (1933) wherein the Court stated at 513:

> "Since the court below [Conn Sup Ct] construed the act of 1923, without regard to the act of 1929, as embracing the event sought to be taxed, and since in that view the question of contract impairment does not arise, we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words."

The appellants, themselves, argue that the "Commerce Clause" problem is only attainable by disputing the Oregon Court's construction as evidenced further by their statements concerning the "basic flaw in the Court's analysis * * *" (Jur St, page 8, footnote No. 13), the contents of their abundant footnotes to the effect that the Oregon Court "argued" to a certain result (Jur St, page 12, footnote No. 20), or "the Court below concluded that the regulation" will operate in a certain manner (Jur St, page 10, footnote No. 16).

It is submitted that under the uniform holdings of this Court, as exemplified in the above citations, the appellants' appeal should be dismissed. "This court * * *

reviews judgments, not statements in opinion." *Black v. Cutter Laboratories*, 351 US 292 (1955).

2. This Court will not exert its jurisdiction merely to review a state court decision upon a question of fact.

The tenor of appellants' complaints on appeal is that the Oregon Supreme court misconstrued, misunderstood and misapplied the questioned regulation. As mentioned in the first Argument, supra, this entails judicial construction by the state court of this regulation. In addition, it necessitates findings to questions of fact and conclusions of fact. The "devastating impact of the regulation" (Jur St, page 8) claimed by the appellants was not found to be a fact by the Oregon Supreme Court. To the contrary, the Oregon court found the regulation would encourage importation of milk (Jur St, page 22). Similarly, the finding that the appellants were not discriminated against by this regulation (Jur St, pages 23-24) is, again, a finding of fact by the Oregon Supreme Court.

This Court applied the above doctrine in *Fry Roofing Co. v. Wood*, 344 US 157 (1952) and stated at 160:

> "We are urged to set aside the findings of the State Supreme Court before passing upon the constitutional question presented. * * * Whether rejection of these findings would place petitioner's Commerce Clause contentions in a more favorable position, we need not consider. * * * There are no exceptional circumstances of any kind that would justify us in rejecting the Supreme Court's findings;"

The appellants are asking this Court to do as the petitioner requested in the cited case—set aside the Ore-

gon Supreme Court's findings and *as a result* discover a Commerce Clause issue and determine the same. That this is not within the accepted province of this Court appears clear. See also: *Grayson v. Harris*, 267 US 352 (1924) at 358, and the cases cited therein. It is again submitted that this appeal should be dismissed on this principle, also.

3. The present appeal presents no substantial federal question demanding this Court's plenary consideration.

The appellants strong, if not sole, reliance upon this Court's holding in *Polar Co. v. Andrews*, 375 US 361 (1964) in order to substantiate the view of a significant federal issue is misplaced.

The Oregon Supreme Court's opinion best expressed the clear distinction of that holding in stating (Jur St, page 26):

> "To come within the holding of the *Polar* case, Oregon's challenged regulation would have to require that handlers must purchase a minimum amount of Oregon-produced milk at Class 1 prices before the handlers could look to secondary sources of supply. This the Oregon regulation does not do. We are satisfied that any burden upon interstate commerce incidental to the preservation of the Oregon market pool is so negligible as to be barren of federal constitutional significance."

In the *Polar* case, the domestic milk supply was guaranteed full Class 1 usage by the administrative order. The Oregon regulation clearly demands nothing of the sort. It demands Oregon pool milk be given the same percentage of Class 1 usage as an Oregon handler actually uses in his plant. The questioned regulation, while fur-

thering the legislative purpose of milk market stabilization, in no sense creates an artificial protective device for local producers. *It does not exclude out-of-state milk.*

As stated in *Bailey Farm Dairy Co. v. Anderson*, (CCA 8) 157 F2d 87, cert den 329 US 788 (1946), and applicable to this Oregon regulation, it

> "* * * does not require payment of Class one price for any producers' milk that is not or cannot be used for Class one purpose * * *"

The "available" usage of an Oregon handler is the restriction in application of this regulation and clearly distinguishes the *Polar* case concept and consequently the *Baldwin v. G.A.F. Seelig*, 294 US 511 (1935) limitations to regulation of local commercial activities.

The arbitrary classification of usage by the appellants is a not too subtle device designed to avoid the Oregon legislative stabilization system, under the pretense of interstate commercial freedom. The appellants' criticism of the Oregon Supreme Court's judgment cannot be justified or sustained by such attempts to "stretch" the clear limitations of the *Polar* and *Baldwin* decisions.

CONCLUSION

For the foregoing reasons, the appellees respectfully submit this appeal should be dismissed and the judgment of the Supreme Court of Oregon affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

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FILED
MAR 2 1967
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1966

No. 1004

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Appellants,

vs.

STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER,
Appellees.

On Appeal from the Supreme Court of the State of Oregon

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

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In the Supreme Court of the United States

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Appellees.

On Appeal from the Supreme Court of the State of Oregon

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

Appellees' motion should be denied.

a. Appellees do not deny that the purpose and effect of the regulation are exactly as appellants describe them. While their motion is based on the statement of the court below that the regulation will encourage interstate milk imports (Jur St 22-23), they do not try to explain or support that statement, either from the record or otherwise,[1] nor do they dispute any part of appellants' showing to the contrary. Instead, they contend that it

1. The contention that a regulation which sharply increases the cost of using imported milk will improve the interstate market is one which reasonably requires some explanation (see Jur St 8-9, 43-50).

is a construction of the regulation and a finding of fact which this Court will not review. In fact, it is neither.

The construction of the regulation is not in issue, nor did it play any part in the decision of the court below.[2] Everybody agrees that the regulation requires a processor who uses pool and nonpool milk to report as Class 1 use of pool milk such proportion of pool deliveries as equals his plant ratio of Class 1 use, whether or not Oregon producers have supplied that amount of his Class 1 sales (see Jur St 21-22; Mot 2-3; Exh 10). The issue is whether the regulation, which appellees do not deny was adopted to protect local producers and increases the cost of using milk purchased from others to a point which virtually eliminates them from the Oregon market, can be sustained under the Commerce Clause.

Nor is the statement of the court below a "finding" that this Court must or should accept. It did not resolve conflicting evidence or inferences,[3] but was based on what the court described as an "economic fact of life" and an assumption about appellees' market pool which they do not deny is wholly erroneous (see Jur St 8,

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2. Appellants obviously disagree with much of the opinion of the court below. They do not, however, disagree with its description of the regulation, and appellees refer to nothing suggesting that they do (Mot 4-5).

3. The facts were all stipulated (Jur St 33). In *Fry Roofing Co. v. Wood*, (1952) 344 US 157 at 160-166, reh den (1953) 345 US 913, relied on by appellees, the state court found, on conflicting evidence, that certain truck lease arrangements were sham. No such issue is presented by this case.

22-23). This appeal asserts a claim of constitutional right, and the Court must review the basis in the record of the lower court's decision to determine if that claim is valid, without regard to labels.

> "* * * If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. * * *" *Truax v. Corrigan,* (1921) 257 US 312 at 324

b. The record shows, and appellees do not deny, that the regulation requires Oregon producers to be paid for Class 1 use of out-of-state milk, and that, as the court below stated, it is its exact purpose to protect the local producer from such use (Jur St 25). This wholly contradicts appellees' denial that the regulation is "an artificial protective device for local producers" (Mot 8). Like the Florida regulation which this Court held invalid in *Polar Co. v. Andrews* (1964) 375 US 361, it does not exclude out-of-state milk, but protects the domestic market for Oregon producers through indirect demands on processors. It is, we suggest, a "not too subtle device" to avoid the requirements of the Commerce Clause (see Mot 8).

CONCLUSION

The questions presented by the appeal are substantial, and appellees' motion should be denied.

Respectfully submitted,

JAMES D. DEZENDORF

Counsel for Appellants

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March 1, 1967

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In the

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October Term, 1966

No. 1004

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STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER,
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On Appeal from the Supreme Court of the State of Oregon

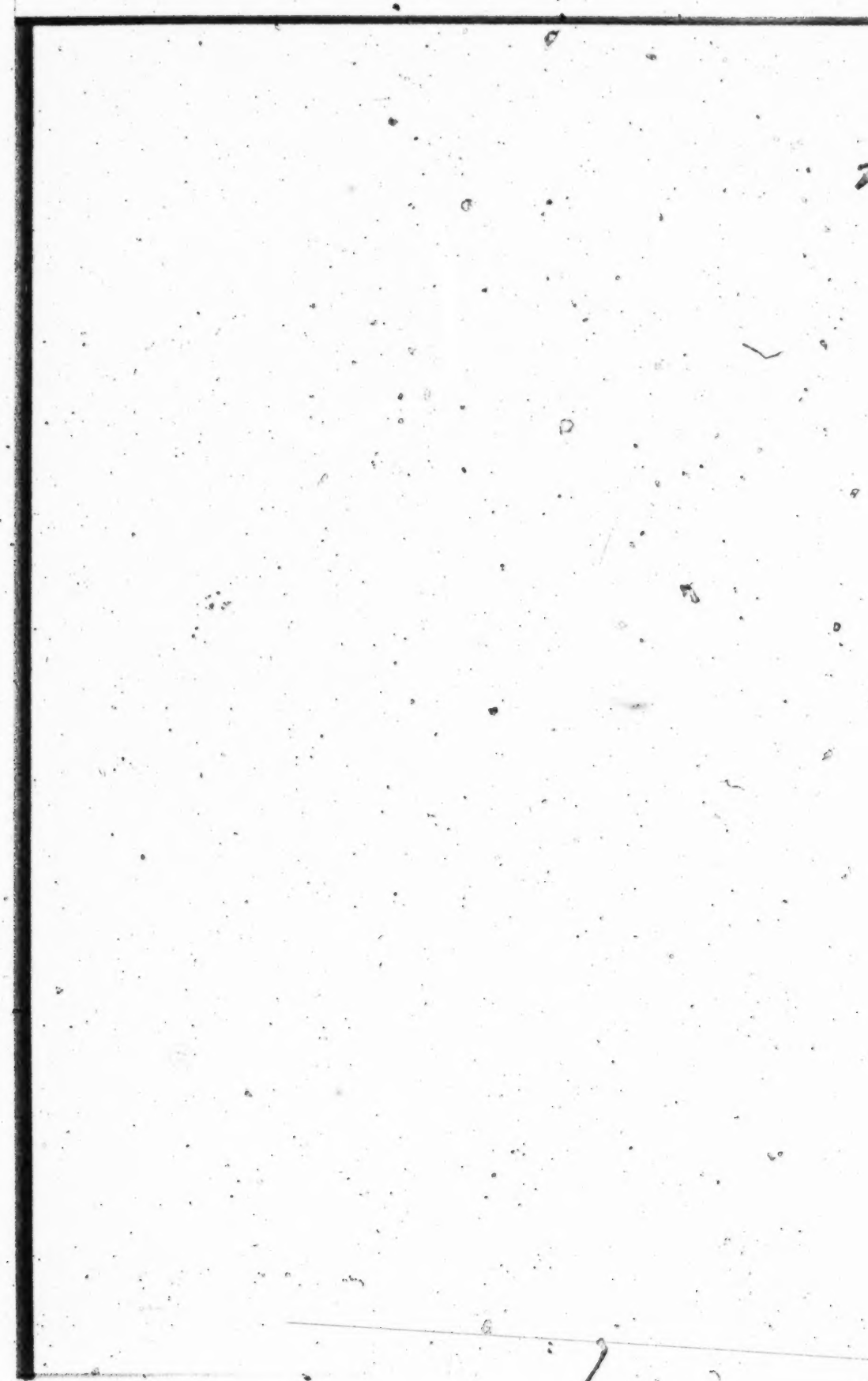
APPELLANTS' PETITION FOR REHEARING OF ORDER DISMISSING APPEAL

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DAILY JOURNAL OF COMMERCE



In the Supreme Court of the United States

October Term, 1966

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vs.

STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER,
Appellees.

On Appeal from the Supreme Court of the State of Oregon

APPELLANTS' PETITION FOR REHEARING OF ORDER DISMISSING APPEAL

Appellants petition the Court for a rehearing of its order of March 20, 1967 dismissing the appeal for lack of a substantial federal question. The petition is based on their conviction that the Court's decision sustaining a state regulation which impairs interstate commerce to protect local economic interests is a substantial departure in constitutional law, which should not be undertaken without hearing those whose interests it prejudices and issuing a reasoned opinion establishing its limits.

It is the promise of the Commerce Clause

> "* * * that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have full access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. * * *" *Hood v. DuMond*, (1949) 336 US 525 at 539.

It is that promise against which the dismissal of this appeal must be measured. Appellants showed, without contradiction or dissent, that it is the precise purpose of this regulation to protect the Oregon blend price of Grade A milk from interstate competition, that it does so by tying the local price to the domestic use of imported milk, and that its intended and certain result is to eliminate milk produced in other states from the Oregon market. These are not the doubtful speculations of a disappointed party: They are the uncontradicted economic facts of life in this interstate market, which faces extinction under the decision of the court below.

Whatever this Court may feel, there is no doubt in the public mind about the purpose and effect of the regulation. In reporting the Court's dismissal of the appeal on March 20, the evening edition of The Oregon Journal stated:

> "The decision ought to cause financial optimism among state milk producers because the milk sta-

bilization law was passed to discourage out-of-state milk imports, which tend to be cheaper than locally produced milk."

Interstate commerce in Grade A milk may be the major casualty of the Court's decision, but it assuredly will not be the only one. In the absence of an opinion expressing the Court's views, the dismissal of this appeal will encourage the legislatures and administrators of other producer states to adopt similar measures to protect local farm interests from interstate competition, measures drawn in reliance on the patently erroneous analysis of the court below which this Court has now approved. Only confusion will result if the basis of the Court's decision denying review is left to speculation.

The limits of constitutional rules are, of course, never fixed, and modifications in the demands of the Commerce Clause are not foreclosed by precedents. However, the Court's recognition of state power to protect local interests by surcharging the use of imported products, which is implicit in its order dismissing this appeal, is unprecedented and substantially alters important federal relationships. We earnestly suggest that constitutional changes of such magnitude should be undertaken only after hearing parties who represent the interests involved and on the basis of a reasoned opinion.

In light of the uncontradicted facts and the public dissent of three Justices, there can be no contention that the issues in this case are insubstantial. The Court has broken new constitutional ground by a summary decision which is, in effect, a decision on the merits. We respectfully object, and ask for reconsideration of the order of dismissal.

Respectfully submitted,

JAMES C. DEZENDORF

Counsel for Appellants

JAMES H. CLARKE

BERTRAND J. CLOSE

of Counsel

March 29, 1967

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

James C. Dezendorf

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ARDEN FARMS CO. ET AL. *v.* STATE DEPARTMENT OF AGRICULTURE ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 1004. Decided March 20, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and the case set for oral argument.